



Linda S. Adams
Acting Secretary for
Environmental Protection

State Water Resources Control Board



Edmund G. Brown Jr.
Governor

Office of Enforcement

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27 June 2011

VIA EMAIL

Mr. Alex Mayer
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Mr. Ken Landau
Central Valley Regional Water Quality Control Board
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PROSECUTION TEAM REBUTTAL ARGUMENT AND REBUTTAL EVIDENCE; ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2011-0562

Dear Mr. Mayer and Mr. Landau:

The Prosecution Team submits this response in rebuttal to Mr. Sweeney's arguments raised in his 13 June 2011 submission. The Prosecution Team continues to recommend a discretionary penalty in the amount of \$11,400 for the violations alleged in Complaint No. R5-2011-0562. Furthermore, the Prosecution Team asserts that Mr. Sweeney's arguments challenging the legality of the underlying Order No. R5-2007-0035, the Waste Discharge Requirements General Order for Existing Milk Cow Dairies (General Order) and the failure of the Central Valley Water Board to grant relief from the reporting requirements at this juncture in an enforcement proceeding are untimely, improper, and should not be considered at the 14 July 2011 hearing.

Procedural Background on Order No. R5-2007-0035

The Central Valley Regional Water Quality Control Board (Central Valley Water Board) adopted Order No. R5-2007-0035, the Waste Discharge Requirements General Order for Existing Milk Cow Dairies (General Order) on 3 May 2007. Part of the General Order includes a Monitoring and Reporting Program No. R5-2007-0035 (2007 MRP), issued pursuant to the Central Valley Water Board's authority under California Water Code (CWC) section 13267. Specifically, the 2007 MRP requires the submission of, among other things, annual monitoring reports every first of July and a Waste Management Plan due 1 July 2009, more than two years after the initial adoption of the General Order.

The annual report is comprised of three main reporting components; information detailing the crops planted and harvested during the calendar year, groundwater monitoring results for those dischargers that monitor supply wells and subsurface drainage systems, and stormwater monitoring results during the wet season. The purpose of the Waste Management Plan is to ensure that the production area of the dairy facility is designed, constructed, operated and

maintained to enable proper management of dairy wastes in compliance with the General Order. Because the Waste Management Plan involves facility design and specifications, the plan must be prepared and certified by a registered engineer. Subsequent to the adoption of Order No. R5-2007-0035, the Central Valley Water Board amended the 2007 MRP on 23 April 2009 by Order No. R5-2009-0029 (2009 MRP). Recognizing the potential maximum cost of completing the Waste Management Plan and the economic conditions affecting the dairy industry with dropping milk prices, the Central Valley Water Board extended the deadline for the submission of the Waste Management Plan from 1 July 2009 to 1 July 2010, more than three years after the adoption of the General Order.

Mr. Sweeney's attempts to challenge the propriety of the underlying General Order are untimely and improper during this enforcement proceeding

In his 13 June 2011 submission, Mr. Sweeney (or Discharger) argues "[w]e would not be in violation of failing to file the reports alleged in the Complaint if such reporting requirements were determined to violate applicable provisions of the Water Code." As mentioned previously, the Central Valley Water Board adopted the General Order on 3 May 2007. If Mr. Sweeney felt aggrieved by either the reporting requirements or the deadlines in which to submit the reporting requirements as established in Table 1 of the MRP, these issues should have been raised within the appropriate time period subsequent to the General Order's adoption. Pursuant to CWC section 13320, Mr. Sweeney had 30 days following 3 May 2007 to petition the Central Valley Water Board's action in adopting the General Order. The appropriate window of time to challenge the reporting requirements in Monitoring and Reporting Program No. R5-2007-0035 has passed. This subsequent attempt to challenge the legality of the reporting requirements in the General Order in the present enforcement proceeding is merely a collateral attack on the General Order and should not be permitted.

Moreover, challenging the legality of the underlying requirement in the MRP, specifically the requirement to submit the 2009 Annual Report, at this juncture is also improper based on the Discharger's previous acquiescence to the very requirements he is now challenging. Previously, the 2007 and 2008 Annual Reports were timely submitted by the Discharger. (Attachment 1 with date stamp received.) Subsequent arguments in this proceeding challenging the annual reporting requirements should be deemed waived based on the Discharger's previous compliance with those very same requirements in the MRP. It was not until the Administrative Civil Liability Complaint was issued did the Discharger challenge the propriety of the underlying General Order.

Mr. Sweeney's attempt to challenge the Central Valley Water Board's failure to provide him an extension to the 1 July 2010 deadlines is similarly not proper in this enforcement proceeding

- 1) Failure to exhaust administrative remedies with respect to challenging the amended deadline for the Waste Management Plan

As previously discussed above, the Central Valley Water Board extended the deadline to submit a Waste Management Plan from 1 July 2009 to 1 July 2010 making the final deadline to submit the plan more than three years after the date of the General Order's adoption. The

impetus in approving the extension of the deadline was the Central Valley Water Board's concern with the recent economic downturn of the dairy industry. (Order R5-2009-0029, Finding 5.) Considering the financial condition of the dairy industry in 2009 and the requirement that the Waste Management Plan be completed by a certified professional, the Central Valley Water Board adopted Order No. R5-2009-0029 granting an additional year for the dischargers under the General Order to comply with that reporting requirement. The Central Valley Water Board adopted Order No. R5-2009-0029 on 23 April 2009. If the Discharger felt aggrieved by this decision, the Discharger had the opportunity to petition the Order to the State Water Board up until 23 May 2009. However, the Discharger failed to timely exhaust his administrative remedies with respect to new deadline for submission of the Waste Management Plan. Not only was Mr. Sweeney on notice of the forthcoming deadline in the original 2007 MRP, but the 2009 MRP with the amended deadline gave all dischargers additional time to comply, but Mr. Sweeney chose to wait until three months prior to the new 1 July 2010 deadline to request relief from that reporting requirement. Any attempt to re-raise a challenge to the deadline for the Waste Management Plan in this enforcement proceeding should be considered untimely and improper.

- 2) Failure to timely seek review of the Central Valley Water Board's failure to provide relief from 1 July 2010 deadline for the 2009 Annual Report

In his 13 June 2011 submission, Mr. Sweeney argues that "[h]ad the staff scheduled a hearing [for an extension of the 1 July 2010 deadlines], it is possible that the regional board could have granted us relief from these deadlines, in which case, we would not be in violation of the filing requirements." Mr. Sweeney wrote a letter asking for an extension of the deadline for submission of the reports due on 1 July 2010. The cited reason for the request was a financial hardship. As discussed above, this request with respect to the deadline for the Waste Management Plan was untimely as the window to petition the 2009 amended deadline had long passed. On 15 June 2010, the staff of the Central Valley Water Board responded to the request stating "Central Valley Water Board staff has no authority to suspend or otherwise modify the reporting requirements specified in the General Order." Additionally, in that same response, the staff suggested that Mr. Sweeney attend the next regularly scheduled board meeting to present his grievances during the public forum portion of the board meeting. To date, Mr. Sweeney has not done so.

Furthermore, Mr. Sweeney states, "[a]nticipating that the staff would refuse to grant said relief [consisting of an extension], we asked the RWQCB staff in our letter of 7 April 2010 to schedule the matter for a hearing before the regional board." The decision to put on the board meeting agenda any item, including a request for modification of the deadlines in MRP No. R5-2007-0035 as they applied to his dairy specifically remained within the discretion of management in consultation with the Executive Officer based on the priorities of the Central Valley Water Board. However, Mr. Sweeney was not without recourse to address the board's inaction with respect to the 2009 Annual Report. Any inaction on the part of the Central Valley Water Board is also petitionable to the State Water Board under CWC section 13320. Following the 15 June 2010 letter from the staff of the Central Valley Water Board, the 30 day window to petition the Central Valley Water Board's failure to grant relief from the 2009 Annual Report would have closed on 15 July 2010. The Discharger did not timely challenge the inaction of the board within the required time period.

Prosecution Team Objections to Discharger's Evidence submitted 13 June 2011

The Prosecution Team hereby objects to the inclusion in the administrative record the documents proffered in the Discharger's 13 June 2011 submission on the basis of relevance. Specifically, the Prosecution Team objects to documents and evidence (a)(14) through (a)(23).

To the extent that these documents are being proffered in support of the Discharger's challenges to the legality of the underlying General Order, the Prosecution Team objects to their inclusion in the administrative record for all of the reasons stated above.

Conclusion

Therefore, because neither of the requirements to submit a 2009 Annual Report or Waste Management Plan were timely challenged, arguments against these requirements should be rejected on jurisdictional grounds in this proceeding. Additionally, any evidence submitted by the Discharger in support of these arguments should be excluded from the record on the basis of relevance. The sole issues of this administrative civil liability hearing are whether the Discharger submitted the 2009 Annual Report and Waste Management Plan by 1 July 2010 as required by the MRP, as amended. The Prosecution Team contends that it is clear that these reports were not submitted by the required deadline and requests that the hearing panel recommend to the full Board the imposition of an administrative civil liability penalty of \$11,400 as proposed.

Sincerely,



Mayumi E. Okamoto
Counsel to the Prosecution Team

Enclosure: Rebuttal Evidence - Attachment 1

cc: [via email w/ enclosure]
James Sweeney, japlus3@aol.com
Clay Rodgers, Central Valley Water Board
Doug Patteson, Central Valley Water Board
Dale Essary, Central Valley Water Board

ATTACHMENT 1

FIRST PAGE OF 2007 ANNUAL REPORT – DATE
STAMPED RECEIVED

FIRST PAGE OF 2008 ANNUAL REPORT – DATE
STAMPED RECEIVED

SMT

Jim Sweeney
Sweeney Dairy
30712 Road 170 Visalia, California 93292
Jim Sweeney: Home: 559-594-5511 Cell: 559-280-8233

RECEIVED

JUN 25 2008

FW002-CVR
FRESNO, CALIF

1. Report Period: May 3, 2007 to December 31, 2007

Were there or will there be any changes to the information provided in your Preliminary Dairy Facility Assessment (PDFA)? This includes any changes or proposed changes included in the Proposed Interim Facility Modification to Balance Nitrogen and to Improve Storage Capacity, if submitted.

☒ No (you do not need to complete or submit the ADFA)

4. **Estimated Amount of Total Manure, Process Wastewater, and Nutrients Generated (complete Attachment A and attach)**

No information at this time on the total manure or process wastewater applied or the nitrogen, phosphorus, potassium or total salt content of this waste.

No information at this time on the nitrogen, phosphorus, potassium or total salt content of this waste.

Total Manure: tons
Total Process Wastewater: gallons
Refer to item #13 below to attach copies of individual manifests.

8. **Areas Where Manure and Process Wastewater Were Applied During the Reporting Period (May 3 through Dec. 31, 2007)**

Type of Waste Applied (manure, process wastewater, both or none during the reporting period of May 3 to Dec. 31, 2007)

[illegible]

ANNUAL DAIRY REPORT JULY 1, 2009

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

Name of Operator	Jim Sweeney
Name of Dairy Facility	Sweeney Dairy
Facility Address	30712 Road 170 Visalia, CA 93292
Contact Name and Phone Number	H= 559-594-5511, C= 559-280-8233

Final Version 8C

All attachments included with Annual Report should include dairy name and address

1. Report Period: January 1, 2008 to December 31, 2008
2. Annual Dairy Facility Assessment (ADFA)
Were there or will there be any changes to the information provided in your Preliminary Dairy Facility Assessment (PDFA) or Annual Dairy Facility Assessment from the last assessment submitted. This includes any changes or proposed changes included in the Proposed Interim Facility Modification to Balance Nitrogen and to Improve Storage Capacity, if submitted.
☐ Yes, [you must complete and include the ADFA (an updated PDFA) with your Annual Report. The ADFA (the updated PDFA) should be completed assuming that all proposed interim modifications have been completed.]
☒ No [you do not need to complete or submit the ADFA]
3. Number and Type of Animals (complete Attachment A and attach)
4. Estimated Amount of Total Manure, Process Wastewater, and Nutrients Generated (complete Attachment A and attach)
5. Estimated Amount of Total Manure, Process Wastewater, and Nutrients Applied to each land application area (Complete Attachments A-1 or A-2, depending on data reporting format (% moisture or density), and A-3, and attach).
6. Estimated Amount of Total Manure, Process Wastewater, and Nutrients Transferred to Other Persons (Complete Attachment L and attach).

Refer to item #13 below to attach copies of individual manifests.

Land Application Area Description (complete table in #8 below and attach).

RECEIVED

JUN 26 2009

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FRESNO, CALIF.